



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 31, 1994

Ms. Elizabeth Lutton  
Senior Assistant City Attorney  
City of Odessa  
P.O. Box 4398  
Odessa, Texas 79760-4398

OR94-158

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 22853.

The City of Odessa (the "city") received an open records request for the personnel files of two former city police officers. You state that the majority of the documents contained in the requested files constitute public information and accordingly will be made available to the requestors. You seek to withhold certain classes of documents pursuant to various exceptions to required public disclosure. We will discuss each of the classes of documents and the exceptions you raise for those documents in turn.

You characterize the documents in category number one as "performance appraisals and written comments on [the former employees'] performance." Citing Open Records Decision Nos. 600 (1992) and 468 (1987), you contend that the performance appraisals and accompanying written comments are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . (Emphasis in original.)

Consequently, Open Records Decision No. 615 overruled Open Records Decision No. 600 to the extent that it held that employees' performance evaluations may be withheld from the public pursuant to section 552.111. We have reviewed the evaluations you submitted to this office for review and have determined that they pertain only to routine personnel matters. The city therefore must release the evaluations and accompanying written comments in their entirety.<sup>1</sup>

The documents in category number two consist of interoffice memoranda on a variety of subjects, but primarily pertain to complaints that had been filed against the two former police officers.<sup>2</sup> Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Id.* at 683-85. You contend that portions of some of the memoranda are protected under common-law privacy because they contain details of "the behavior of intoxicated and disorderly person[s] and family disputes." Where information in police records details criminal activity, that information generally does not come under the

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<sup>1</sup>We note that these and other requested documents contain the social security numbers of the two officers. This office recently concluded in Open Records Decision No. 622 (1994) at 3 (copy enclosed) that amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), make confidential any social security number obtained or maintained by any "authorized person" pursuant to any provision of law, enacted on or after October 1, 1990, and that any such social security number is therefore excepted from required public disclosure by section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the officers' social security numbers were obtained or are maintained pursuant to such a statute and are therefore confidential under section 552.101 in conjunction with section 405(c)(2)(C)(vii). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the city should ensure that none of these numbers were obtained or are maintained pursuant to any provision of law, enacted on or after October 1, 1990.

<sup>2</sup>Citing Open Records Decision Nos. 329 (1982) and 208 (1978) as authority, you contend that the only types of information that the city must release are the names of the officers and complainants involved and the final dispositions of the complaints. The open records decisions that you cite concerned requests for specific types of information that did not include the types of information at issue here. Consequently, those decisions are not entirely dispositive in this instance.

protection of common-law privacy. *See, e.g.*, Open Records Decision No. 611 (1992) (family violence). *But see* Open Records Decision No. 339 (1982) (common law privacy permits the withholding of the name of victim of a serious sexual offense). We have marked a portion of one of these records that the city must withhold because it reveals the names of rape victims.<sup>3</sup> *See id.* The remainder of the records do not implicate such interests.

You also invoke the "informer's privilege" under section 552.101 with regard to the names of confidential informants and witnesses. For the informer's privilege to apply, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 391 (1983); 191 (1978). Most of the complaints filed against the police officers do not constitute violations of the law; consequently the informer's privilege is inapplicable to the identity of the complainants. *See* Open Records Decision No. 515 (1988). We further note that to the extent the complainants may have alleged potentially criminal conduct, the officers in question were made aware of the identities of the complainants and given the opportunity to respond to the allegations; consequently, the purpose of the informer's privilege would not be served by now withholding the complainants' identities. *See* Open Records Decision No. 208 (1978) (informer's privilege does not apply when the informant's identity is known to the party who is the subject of the complaint). This office located only one record identifying a confidential informant. We have marked this information. It may be withheld under the informer's privilege.

You also seek to withhold the names of complainants and witnesses pursuant to section 552.108, the "law enforcement" exception. When a governmental body claims section 552.108, this office must consider whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986). Information about witnesses may be withheld if it is apparent from an examination of the facts of a particular case that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement officers. Open Records Decision No. 252 (1980). Whether disclosure of particular records will unduly interfere with crime prevention must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981). In this instance, you have not demonstrated how the release of the identities of these particular complainants and witnesses would subject witnesses to possible retaliation or harm future cooperation between witnesses and law enforcement. Consequently, the city may not withhold any of the names of complainants or witnesses pursuant to section 552.108.

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<sup>3</sup>In so ruling, we assume that the names of these victims do not appear in court records. Otherwise, the victims would now have no privacy interest in this information. *See Star-Telegram v. Walker*, 836 S.W.2d 54 (Tex. 1992) (no privacy interest in information found in public court documents).

Finally, you contend that section 552.111 protects these records. Because these records pertain solely to personnel matters, section 552.111 is inapplicable here. *See* discussion *infra*. We note, however, that one of the records contains a police officer's home telephone number. This information must be withheld pursuant to section 552.117(1)(B) of the Government Code. *See* Open Records Decision No. 532 (1989).

Category number three consists of several disciplinary memoranda. For the reasons discussed above, section 552.111 is inapplicable here. Nor does the information contained in these records implicate the privacy interests of the officers who were subject to disciplinary action. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). The city must release these records in their entirety.

Category number four consists of "personal history statements" completed by the former officers when they applied for employment with the city and related "background investigation evaluation summaries" created by police personnel. The personal history statements contain items such as prior drug and alcohol use, family problems, and personal financial data that you contend are protected by common-law privacy. *See* discussion *infra*. Most of the information contained in the personal history statements is of legitimate public concern because it pertains to the applicants' qualifications. We have marked the portions of the statements that the city must withhold on privacy grounds. *See* Open Records Decision No. 373 (1983) (personal financial information). We note that the city must also withhold the officers' current and former home addresses and telephone numbers pursuant to section 552.117(1)(B). *See* Open Records Decision No. 622 (1994) at 5-6. Because the evaluation summaries do not come under the protection of section 552.111, these records must be released in their entirety.

Category number five consists of two legal memoranda written by the police legal advisor. You contend that the memoranda constitute legal advice and are therefore protected by section 552.107. Section 552.107(1) of the Government Code protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and opinion and confidential attorney-client communications. *Id.* We agree that the two memoranda constitute legal advice and opinion protected under section 552.107(1). However, because an attached memorandum dated February 8, 1984, written by a deputy chief of police, does not contain legal advice or opinion from an attorney or a confidential attorney-client communication, the city must release this record.

You contend that the records in category numbers six and seven are protected by common-law privacy because they contain information pertaining to medical and family problems. We agree that portions of these records must be withheld and have marked the records accordingly. *See* Open Records Decision Nos. 484 (1987); 237 (1980).

Finally, you contend that certain witness statements filed in connection with citizens' complaints against the officers are protected under sections 552.101 and 552.108. For the reasons discussed above, these exceptions are inapplicable. The city must release the witness statements in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/RWP/rho

Ref.: ID# 22853

Enclosures: Open Records Decision No. 615  
Marked documents

cc: Mr. Lane Arthur  
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(w/o enclosures)